

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ROBINSON,

Defendant-Appellant.

UNPUBLISHED

May 20, 2003

No. 235103

Muskegon Circuit Court

LC No. 00-045111-FC

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, one count of assault with intent to commit armed robbery, MCL 750.89, and four counts of possessing a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

This case arises from a robbery at the Shultz Haus Bar in Muskegon Heights, during which a patron of the bar was shot and killed. At trial, defendant testified that he was not involved in the robbery and had lied to the police when he gave a statement incriminating himself because Demerit Jones, a participant in the robbery who testified against defendant at trial, threatened to kill him if he did not do so. On cross-examination, the prosecutor elicited testimony from defendant that he habitually carried a loaded .22 caliber handgun, had illegally purchased ammunition for that weapon, was not afraid to shoot at someone if necessary, and had in fact shot at someone in the past. On appeal, defendant argues that this latter testimony was improperly admitted as evidence of his character and propensity to commit the charged crimes, and that its admission denied him a fair trial. We disagree.

Because this issue was not preserved by proper objection at trial,¹ our review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). We find no such error here. Even assuming that admission of the challenged testimony constituted plain error, the error was not outcome

¹ Although defense counsel objected to a portion of the challenged testimony on the ground of relevance, that objection was insufficient to preserve the issue raised on appeal. See *People v Saved*, 217 Mich App 393, 398; 551 NW2d 478 (1996) (an objection on one ground is insufficient to preserve an appellate attack on another ground).

determinative in light of the strong evidence of defendant's involvement in the robbery. In addition to Jones' testimony that defendant was a willing participant in the crime, a second confessed accomplice, Ryan Robinson, implicated defendant in both the planning and execution of the robbery. Both Jones and Robinson, who testified that he and defendant were best friends, also testified that defendant used a .22 caliber revolver during the robbery, which Jones indicated defendant fired at least two times while inside the bar. Consistent with Jones' testimony, police investigators testified that a .22 caliber bullet recovered from inside the bar matched those found in a box of cartridges discovered during a search of defendant's home. Jones also testified that it was defendant who accosted the only female patron in the bar at the time of the robbery, who herself identified defendant as her assailant while testifying at trial. Given this evidence, we conclude that admission of the challenged evidence, even if error, does not require reversal of defendant's convictions. *Id.*; see also MCR 2.613(A).

Defendant also argues that the prosecutor improperly vouched for Jones and Robinson by referencing the truthfulness requirements of their plea agreements during closing and rebuttal argument. Generally, this Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, because defendant failed to preserve this issue by objecting to the allegedly improper argument below, our review is again precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

While it is generally improper for the prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," the simple reference to a plea agreement containing a promise of truthfulness is not, without more, grounds for reversal. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, in referencing the plea agreements under which Jones and Robinson testified, the prosecutor did not vouch for the credibility of either witness by stating or implying that he had some special knowledge regarding the truth of their testimony. Rather, he argued from the facts, i.e., the terms of the plea agreements, that Jones and Robinson were credible witnesses. There was nothing improper in this argument. *Id.*

Defendant also argues that the prosecutor improperly used defendant's testimony that he habitually carried a loaded .22 caliber handgun and was not afraid to use it to argue that defendant was "prone to breaking the law" and was thus likely one of the robbers. We again review this unpreserved claim for plain error. *Schulte, supra*.

Contrary to defendant's assertion, while the prosecutor did reference the challenged testimony during his closing remarks he did so solely in asking the jurors to evaluate the credibility of defendant's claim that he was not involved in light of the testimony of his confessed accomplices. Specifically, the prosecutor noted that defendant's admissions in this regard were consistent with Jones' testimony that defendant was chosen as one of the three accomplices to actually enter the bar because he was one of the "craziest."² The prosecutor

² Although there were a total of five participants in the robbery, two were chosen to wait outside the bar as "lookouts" while the others entered the bar to commit the robbery.

further noted that this testimony was consistent with Jones' testimony concerning defendant's conduct once inside the bar, i.e., shooting the gun at a woman near the end of the bar. This Court has held that "a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In the instant case, the prosecutor asked the jury to evaluate defendant's credibility in light of the evidence presented at trial. The prosecutor's argument did not amount to error, plain or otherwise. Accordingly, the issue has been forfeited.

Defendant next asserts that his trial counsel was ineffective for failing to object to the errors alleged above. However, in order to establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). As discussed above, admission of the challenged evidence, even if error, was harmless, and the prosecutor's remarks were not improper. Accordingly, defendant has failed to show the requisite deficiency of performance or resultant prejudice.

We affirm.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra